STATE OF MICHIGAN

COURT OF APPEALS

GERALD G. KESTI,

Plaintiff-Appellee,

v

ROY W. AHO, SUZANNE L. AHO, RONALD F. ALBIERO, PATRICIA A. ALBIERO, WILLIAM H. KAPLA, JOSEPH D. SABO, DUANE T. WILLIAMS, and DEBORAH S. WILLIAMS,

Defendants-Appellants,

and

STEVEN M. JOHNSON, THOMAS F. MARTIN, KRISTINE L. MARTIN, RANDALL L. DAVIS, BARBARA A. TRUE-DAVIS, PAUL J. YANNY, ELLEN L. MARTIN-YANNY, CONSTANCE J. JOHNSON, PATRICK H. SCHAEFER, CAROL J. SCHAEFER, KEVIN E. SWEERE, WILLIAM L. JOHNSON, and EDDIE JEAN JOHNSON,

Defendants.

UNPUBLISHED
June 26, 2014

No. 316357
Houghton Circuit Court
LC No. 2011-014865-CH

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

This appeal concerns a right of way easement that crosses plaintiff's land; all defendants are individuals who own property that they access by making use of the right of way. Defendants' rights to make use of the right of way arise from several different easement conveyances, most of which are not at issue in this appeal. The appealing defendants claim the right to access certain parcels of property through the so-called Copper Range Easement, which the trial court concluded did not benefit the defendant-appellants. They appeal that portion of the trial court's judgment. We affirm.

Plaintiff is the fee owner of a parcel of property that straddles the Graveraet River in Stanton Township, Houghton County. A roadway, known by various names; including National Container Road, Container Road, and Graveraet Crossing Road; traverses plaintiff's property

and crosses the Graveraet River. Defendants all own property that they access by using the roadway, and this case arose out of a dispute among the neighbors regarding the scope of the easement. The trial court's decisions regarding the Mead Easement, the Champion Easement, and the Johnsons' prescriptive easement are not at issue in this appeal. The only issue on appeal is whether defendants-appellants have rights to access portions of their property located in Section 34 of T55N, R36W under the Copper Range Easement.

In 1950, Calumet & Hecla Consolidated Copper Company owned property that would eventually include plaintiff's property. After various conveyances to successor entities, Francis Durocher acquired title to the property in 1983. After Durocher's death, his estate conveyed the relevant property to Gerald and Ruth Jakuri in 1996. The Jakuris conveyed plaintiff's parcel to him in 2000. Plaintiff's parcel is the North Half of the Northwest Quarter of Section 2, Township 54 North (T54N), Range 36 West (R36W), and it enjoys an easement for ingress and egress over Section 1.

The relevant parcels belonging to defendants-appellants are located in fractional Section 34, T55N, R36W, which is to the northwest of plaintiff's property. According to the Houghton County plat book, as of 1958, Copper Range Development Company owned property that included land that would eventually become the parcels at issue owned by defendant-appellants. Copper Range also owned a large tract of land in Section 3, T54N, R36W, which was to the west of plaintiff's property and contiguous to the above parcels in Section 34. By 1991, Copper Range had conveyed the Section 3 property to Mead Corporation. Durocher, then still alive, granted an easement across what would become plaintiff's property to Mead, for the explicit benefit of parcels of property in Section 3, T54 N, R36W ("the Mead Easement"). On March 8, 1994, Copper Range conveyed, *inter alia*, the relevant portion of fractional Section 34 to the Joseph D. Sabo Family Trust ("the Sabo Trust") by quit claim deed.[1] That conveyance included a purported easement right "over the Freda cross-cut road" through what would become plaintiff's property ("the Copper Range easement"). The "Freda cross-cut road" is presumed to be the same roadway described as Container Road or Graveraet Crossing Road. Later in 1994, Mead conveyed a portion of its property in Section 3 to the Sabo Trust.

In a nutshell, defendants-appellants' parcels in Section 34 all derive, directly or indirectly, from conveyances from the Sabo Trust. The portions of defendants-appellants' property in Section 3 derives from Mead, either directly or through the Sabo Trust or other mesne conveyances. Each defendant-appellant owns property located in both Sections 3 and 34. Plaintiff did not dispute, at least in general terms, that defendants had easement rights to access their property in Section 3. Insofar as the instant appeal is concerned, defendants-appellants' claimed easement rights for accessing their property in Section 34 over plaintiff's property are derived from the Copper Range easement. Plaintiff points out that the Copper Range conveyance to the Sabo Trust was a quit claim deed and there was simply no evidence presented

[1] A quit claim deed conveys only whatever interest the grantor has. MCL 565.3. That interest may well be none at all. See *Messenger v Peter*, 129 Mich 93, 98-100; 88 NW2d 209 (1901).

at trial to show that Copper Range had itself ever acquired any easement rights over what became plaintiff's property.

The trial court found that the property in Section 34 was not benefitted by any easement over plaintiff's property. "We review the trial court's findings of fact in a bench trial for clear error and conduct a review de novo of the court's conclusions of law." *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001), citing MCR 2.613(C). "An action for a prescriptive easement is equitable in nature. This Court reviews de novo the trial court's holdings in equitable actions. In addition, this Court reviews the trial court's findings of fact for clear error." *Mulcahy v Verhines*, 276 Mich App 693, 698; 742 NW2d 393 (2007) (citations omitted). Defendants-appellants advance two arguments: first, that the trial court was incorrect in holding that the Copper Range easement did not benefit the parcels in Section 34, and second, that the parcels in Section 34 had acquired prescriptive easements even if the express Copper Range easement was itself defective.

"An easement is the right to use the land of another for a specified purpose." *Heydon v MediaOne*, 275 Mich App 267, 270; 739 NW2d 373 (2007), quoting *Schadewald v Brulé*, 225 Mich App 26, 35; 570 NW2d 788 (1997). "A right of way cannot very well be granted by deed, estoppel, or otherwise, by anyone but the landowner." *von Meding v Strahl*, 319 Mich 598, 606; 30 NW2d 363 (1948). Irrespective of the intended beneficiary of an easement, only the fee owner of a parcel can grant an easement burdening that parcel. Defendants-appellants assert that the Copper Range easement exists to benefit their property in Section 34, which is obviously true. However, it is not relevant because Copper Range was not the fee owner of the relevant property to be burdened by the purported easement. Had Copper Range already itself had an easement over the property, it could of course convey what it owned. However, again, plaintiff correctly points out that no record evidence shows Copper Range or a predecessor in interest receiving any such easement. Therefore, when Copper Range quit claimed to the Sabo Trust, it had no right to create an easement and it apparently did not own one.

The fact that the purported easement was recorded does not bootstrap it into reality, so the fact that plaintiff acquired his property "subject to all easements . . . of record" is irrelevant. The recording statute only exists to protect subsequent bona fide purchases. See 1 Cameron, Michigan Real Property Law (3d ed), § 11, p 374. Likewise, the fact that the Copper Range easement was mentioned in some later deeds also cannot bootstrap a nullity into existence. In any event, neither the purported Copper Range easement nor any subsequent mention thereof would have been in plaintiff's chain of title or elsewhere for plaintiff to be on notice thereof. A title search would not have turned up the Copper Range Easement because no predecessor in interest of the property ever granted an easement to Copper Range, and no grantee of the property ever received a deed reserving such an easement to its grantor.

The trial court correctly determined that defendants-appellants' property in Section 34 was not benefitted by an express easement granted over plaintiff's property. The fact that defendants-appellants' properties cross the section boundaries into Section 3, which *is* benefitted by an easement over plaintiff's property, is not relevant. "An appurtenant easement . . . attaches to the land and is incapable of existence separate and apart from the particular land to which it is annexed." *Schadewald*, 225 Mich App at 35. The land burdened by an easement may not "be burdened to a greater extent than was contemplated at the time of the creation of the easement."

Id. at 37, quoting *Bang v Forman*, 244 Mich 571, 574; 222 N.W. 96 (1928). This includes the principle that the easement can only be used to benefit the dominant estate and cannot be used to benefit other non-dominant parcels—even contiguous parcels held by the owner of the dominant estate. See *Soergel v Preston*, 141 Mich App 585, 589; 367 NW2d 366 (1985).

Nevertheless, easements can also come into existence by prescription. *Heydon*, 275 Mich App at 270. "An easement by prescription results from use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years." *Mulcahy*, 276 Mich App at 699, quoting *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 679; 619 NW2d 725 (2000). We need not discuss defendants-appellants' theories of why their use of the easement is hostile and adverse to plaintiff's rights, because plaintiff concedes as much. Plaintiff also concedes that the use has been continuous for the requisite period of time. Plaintiff contends only that the use was not sufficiently open and notorious. Open and notorious use is use that provides sufficient notice "as to leave no doubt in the mind of the owner of the land that his rights are invaded in a hostile manner." *Menter v First Baptist Church of Eaton Rapids*, 159 Mich 21, 25; 123 NW 585 (1909).[2]

As noted, plaintiff concedes that defendants-appellants have an easement right to cross his land to access their property in Section 3 under the Mead Easement. When the roadway exits plaintiff's property on the west, it enters defendants-appellants' property entirely within Section 3. Nothing about defendants-appellants' lawful use of the Mead Easement would ever indicate to plaintiff that defendants-appellants were using the Mead Easement beyond its scope to access their property in section 34. Plaintiff has no right of access to defendants-appellants' property to the west of plaintiff's property. Therefore, if plaintiff had ever become suspicious that defendants-appellants were abusing the Mead Easement, plaintiff would have had to trespass onto defendants-appellants' land to confirm his suspicion. In contrast, in prior case law involving imperfectly created servitudes, the parties had been in close proximity to each other and actually able to see each other's activities from their own properties. See *Mulcahy*, 276 Mich App at 695-697; see also *Prose*, 242 Mich App at 682-683. The trial court held that "[plaintiff] would have had no reason to be put on notice that defendants-appellants, while rightfully traversing the Mead Easement, were, in fact, making a claim that they had easement

[2] Although *Menter* is an adverse possession case, subsequent cases apply its definition of open and notorious in the prescriptive easement context. See, e.g., *Whitehall Leather Co, Div of Genesco v Capek*, 4 Mich App 52, 55; 143 NW2d 779 (1966).

rights associated with the more expansive Copper Range Easement. Defendants-appellants, therefore, gain no such rights through prescription." We agree.[3]

Affirmed.

/s/ Jane M. Beckering
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra

[3] In the interests of completeness, we observe that there is another manner in which an easement can be created, that of necessity. An easement by necessity arises by implication of law and exists only so long as the owner of a parcel has no other possible way to access the parcel, not merely no convenient way to do so. See *Waubun Beach Ass'n v Wilson*, 274 Mich 598, 608-615; 265 NW 474 (1936). However, defendants-appellants have not presented evidence that their properties in Section 34 are inaccessible without traversing their properties in Section 3, so we will not presume any such need exists.